SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 30 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

MOTION TO DISMISS OR AFFIRM

HARRY LEVY,
Attorney for Appellees,
250 Broadway,
New York, New York 10007.
433-5015

Of Counsel:

PAUL W. HESSEL,
I. STANLEY STEIN.

---

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Motion and Grounds	1
The Facts	2
Argument	12
A Federal Constitutional Question Not Having Been Expressly Passed Upon by the State Court as the Sole Basis for Its Determination, or Shown by the Record to Have Been Timely and Properly Raised, This Court Will Not Assume Jurisdiction of This Appeal	12
This Appeal Does Not Present a Substantial Federal Question	17
A. The determination of the New York courts was predicated basically upon other than constitutional grounds—state or federal	17
B. The contractual provisions and their enforcement present no constitutional or federal question	18
C. The alleged deprivation of constitutional rights was not that of this appellant, and it has no standing to assert them	19
The Determination Appealed From Not Being Final Within the Meaning of the Judicial Code, 28 U.S.C. Section 1257, This Court Has No Jurisdiction Over This Appeal	21
In Any Event, the Decision of the State Court Appealed From Is So Manifestly Correct That No Further Argument Thereon Is Necessary	22
Conclusion	26

TABLE OF CASES

PAGE

Atkins v. Kansas, 191 U. S. 207, 222 18

Bailey v. Anderson, 326 U. S. 203, 206 16

Baltimore & Ohio R. Co v. Interstate Com. Com., 221 U. S. 612, 622 20

Bank of Augusta v. Earle, 38 U. S. 517, 596 26

Beck v. Washington, 369 U. S. 541, 549-554 16

Beilan v. Board of Education, 357 U. S. 399 23

Campbell v. City of New York, 244 N. Y. 317, 327 .. 18

Campbell Painting Corp. v. William Reid et al., Constituting the New York City Housing Authority 48 Misc. (2) 544-546 (Article 78 Proceeding) .. 8, 10

Campbell Painting Corp. v. William Reid et al., Constituting the New York City Housing Authority 26 A. D. (2) 912 (Injunction Action) 11

Campbell Painting Corp. v. William Reid et al., Constituting the New York City Housing Authority 20 N. Y. (2) 370-377 (Article 78 & Injunction Action) 3, 11, 13, 21, 23

Charleston Assn. v. Alderson, 324 U. S. 182, 186 16

Crane v. New York, 239 U. S. 195 18

Essgee Co. v. United States, 262 U. S. 151 20

Garrity v. New Jersey, 385 U. S. 493 22

Gospel Army v. Los Angeles, 331 U. S. 543, 546 ... 22

Hale v. Henkel, 201 U. S. 43, 74, 75 20

Hicklin v. Coney, 290 U. S. 169, 172 21

Hollerbach v. U. S. 233 U. S. 165, 171 18

Lerner v. Casey, 357 U. S. 468 23

Lynch v. New York, 293 U. S. 52 ..... 14, 16

Market Street Railway Co. v. Commission of California, 324 U. S. 548, 551 22

PAGE

Matter of Gardner v. Broderick, 20 N. Y. (2) 227 .. 23

Nelson v. Los Angeles County, 362 U. S. 1, 7 23

People v. Crane, 214 N. Y. 154, 174 18

Spevack v. Klein, 385 U. S. 511 22

Uniformed Sanitation Men Association v. Commissioner of Sanitation (—— F. (2) ——) 23

United States ex rel. Laino v. Warden, 246 F. Supp. 72, 92, 94-96, 98 .....24, 26

United States ex rel. Laino v. Warden, 355 F. (2) 208 24

United States v. White, 322 U. S. 694, 699 20

Wilson v. Cook, 327 U. S. 474 16

Wilson v. United States, 221 U. S. 361, 383-385 20

STATUTES CITED

Public Authorities Law, Section 2601 ....3, 4, 9, 11, 13, 17

Public Authorities Law, Section 2602 .....3, 4, 8, 24

Public Authorities Law, Section 2603 ...4, 6, 10, 11, 13, 21

Public Housing Law, Section 151 17

Judicial Code, 28 U.S.C., Section 1257 21

MISCELLANEOUS

Wigmore on Evidence (McNaughton, Rev. ed. 1961), Section 2275, v. 8, p. 453 19

Cooley, Constitutional Limitation (8 ed.), v. 1, pp. 368-369 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

MOTION TO DISMISS OR AFFIRM

Motion and Grounds

Appellees (hereinafter sometimes referred to as the "Authority"), hereby respectfully move, pursuant to Rule 16 of the Rules of this Court, that this appeal be dismissed, or in the alternative, that the order of the Court of Appeals of New York appealed from be affirmed, on the following grounds:

1. That this appeal is not within the jurisdiction of this Court.

2. That as an appeal from a state court

(a) it does not present a substantial federal question.

(b) the federal question sought to be reviewed was not timely or properly raised, or expressly passed on.

(c) the judgment appealed from rests on an adequate non-federal basis.

3. That in any event the decision of the state court involved in this appeal is so manifestly correct that no further argument thereon is necessary.

The Facts

References to the Record in the plenary action will be made as follows: (R.); and to the separate Record in the Article 78 proceeding as follows: (Art. 78 R.). References to Appellant's Jurisdictional Statement will be made thus: (Jur. Stat., p.).

Appellees respectfully submit herewith, by reference to the Records, somewhat more of the history, background and highlights of these litigations than are set forth in Appellant's Jurisdictional Statement. Upon the basis thereof Appellees propose to demonstrate by its argument below that the foregoing grounds for dismissal of this appeal, or for affirmance, are amply sustained.

1. Each of the three contracts between Appellant corporation and Appellee Authority described in the Records, executed on behalf of Appellant by George Campbell, Jr. as its president (R. 35), contained the following provisions (R. 36):

"38. Cancellation and Disqualification for Failure to Waive Immunity.

Upon the refusal by a person, when called before a Grand Jury to testify concerning any transaction or

contract had with the State, any political subdivision thereof, a public authority or with any public department, agency or official of the State or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

A. Such person and any firm, partnership, or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling or submitting bids to or receiving awards from or entering into any contracts with the Authority for goods, work or services, for a period of five (5) years after such refusal, and

B. This Contract and any and all other contracts made with the Authority on or after July 1, 1959, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the Authority, without incurring any penalty or damages on account of such cancellation or termination, but monies owing by the Authority, for goods delivered or work done prior to the cancellation or termination shall be paid."

While such provisions were mandated in all contracts of public Authorities by Section 2601 of the New York Public Authorities Law (Jur. Stat., pp. 24-25), it is Appellee's position, as set forth in its argument below, that under the powers granted to it by the New York Public Housing Law it would have had the right to include these provisions in its contracts regardless of the existence of Section 2601.

2. Section 2602 of the Public Authorities Law (Jur. Stat., pp. 25-26) sets forth an alternative provision for automatic disqualification from bidding public contracts, regardless of any action by a particular public agency under contractual provisions, of any contractor whose officer has refused to waive immunity in a specified grand

jury investigation. Such disqualification shall be "... for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title".

3. Section 2603 (Jur. Stat., pp. 26-27) provides for a special court proceeding whereby the disqualification, whether imposed by and with respect to a particular public agency under contractual provisions pursuant to Section 2601, or automatically with respect to all public agencies pursuant to the statutory requirements of Section 2602, may be removed with respect to a "... corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative". (Opinion of New York Court of Appeals, 20 N. Y. 2d 370, 376; Jur. Stat., p. 19.) However, the sole responding parties to such 2603 proceeding are to be the Attorney General and "... the officer who conducted the investigation before the grand jury in which the refusal occurred ..." (Jur. Stat., p. 26), the latter, in this instance, being the District Attorney of New York County.

4. The disqualification of Appellant corporation in question herein was set forth in Appellee Authority's letter of April 21, 1965 (Exhibit B Annexed to Petition, Art. 78, R. 20-21), and, as will be noted therefrom, was imposed wholly "... in accordance with the further provisions of said Section 38 ..." (of the contracts), as were the cancellation of such contracts.

5. Both such cancellation and disqualification were vigorously objected to in a letter of Appellant's attorneys to Appellee Authority dated April 23, 1965 (Exhibit C-1 Annexed to Petition, Art. 78, R. 23-26), which adverted to a previous letter of April 9, 1965 (Exh. C Annexed to Petition, Art. 78, R. 22), informing Appellee of George Campbell, Jr.'s resignation as an officer and director prior to his appearance before the Grand Jury. This letter reads, in part, as follows:

> "I direct your attention to Section 38 of the Amendments to General Conditions entitled 'Cancellation and

Disqualification for Failure to Waive Immunity'. It is a fact that George William Campbell, Jr. refused to waive immunity at an appearance before a Grand Jury of New York County on April 14, 1965.

Your attention is directed to Subdivision (a) of Section 38, which clearly speaks in the present tense, when it refers to the disqualification of the person failing to waive immunity and in Subdivision (b), it speaks in the present tense, when it refers to the right of the Authority to cancel existing contracts as a result of the relationship between the person failing to waive immunity and the corporation under contract with the Authority.

It is respectfully submitted that if George William Campbell, Jr. resigned as an officer, director and stockholder prior to his being called upon to waive immunity and prior to his failure to waive immunity, that the provisions of Section 38 have no application and should not be applied or enforced by the Authority, with relation to any contracts existing between the Authority and George Campbell Painting Corp."

6. Upon the rejection of such letter and a following telegram (Exh. E Annexed to Petition, Art. 78, R. 27), Appellant commenced in the Supreme Court of New York its first litigation in this matter. This was entitled as follows (See Stipulation as to Prior Proceedings, Art. 78, R. 38-39):

"In the Matter of the Application

of

GEORGE CAMPBELL PAINTING CORP.,

Petitioner,

For a Review Pursuant to Article 78 of the Civil Practice Law and Rules and Section 103(c) of the General Municipal Law,

against

WILLAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, members of THE NEW YORK CITY HOUSING AUTHOR-

ITY, THE NEW YORK CITY HOUSING AUTHORITY, LOUIS J. LEFKOWITZ, Attorney General of the State of New York and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents."

This litigation is nowhere mentioned in the Jurisdictional Statement, although by the above Stipulation (Art. 78, R. 38-39) it is expressly made part of the Record herein. The Petition therein set forth two "proceedings" (R. 33-34, 44): first, an Article 78 proceeding against Appellee Authority, and, second, a separate proceeding against the Attorney General and the District Attorney "... pursuant to Section 103(c) of the General Municipal Law ..." (which is identical with and was intended to refer to Section 2603 of the Public Authorities Law).

The Article 78 proceeding attacked the cancellation of the contracts and Appellant's disqualifications on the same ground of misinterpretation of the contractual provisions as was set forth in the letter of Appellant's attorneys referred to in Paragraph "5" above (Exhibit C-1 Annexed to Petititon, Art. 78, R. 23-26), while the proceeding against the Attorney General and District Attorney basically set forth the requirements of Section 2603 of the Public Authorities Law.

On its own motion Appellant voluntarily discontinued the latter proceeding. The Article 78 proceeding as against Appellee Authority was thereafter dismissed by Justice Lyman of the New York Supreme Court for failure of Appellant to have filed, as a condition precedent thereto, a Notice of Claim pursuant to Section 157 of the New York Public Housing Law, but with leave to renew (R. 33-34, 44).

7. Thereafter Appellant filed with Appellee Authority such Notice of Claim, dated July 2, 1965 (Exh. A Annexed to Complaint, R. 27-30). It will be particularly noted that

this claim seeks One Million Dollars in damages, the right to have its contracts reinstated, and the disqualification vacated, expressly on the following grounds:

> ". . . because of the New York City Housing Authority's wrongful interpretations and application of the provisions of the contract entered into by and between George Campbell Painting Corp. and the New York City Housing Authority and the applicable statutes.
>
> "The damages, wrongful cancellation of the contracts and wrongful barring of the claimant from future bidding for a period of five (5) years were sustained as a result of the action by The New York City Housing Authority purportedly pursuant to provisions of the contract and applicable statutes claiming a violation thereof by a member, partner, director or officer of the claimant refusing to sign a waiver of immunity. The New York City Housing Authority in making the determination of cancelling the existing contracts and barring petitioner from future bidding for five (5) years for the alleged refusal of George Campbell, Jr. to waive immunity before the New York Grand Jury, was a breach of contract and violated the claimant's rights and was based upon the erroneous information and/or interpretation of the aforesaid contracts and statutes in that the aforesaid George Campbell, Jr. was no longer an officer, director or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and, moreover, was not an officer, director or stockholder at the time a subpoena was served upon him for his appearance as aforesaid. The decision by The New York City Housing Authority was arrived at despite the fact that they were informed by letter dated April 9, 1965 that George Campbell, Jr. was no longer an officer and director of the corporation.
>
> The Undersigned, George Campbell Painting Corp., claims damages in the sum of One Million

($1,000,000.00) Dollars for loss of profits on contracts they were prevented from obtaining because of said wrongful determination by The New York City Housing Authority."

8. After filing such Notice of Claim, and predicated thereon, Appellant brought on against Appellee a second Article 78 proceeding. That is the proceeding set forth in the Article 78 Record herein, dismissed by Justice Tilzer of the New York Supreme Court without prejudice to a plenary suit (48 Misc. 2d 544, 265 N.Y.S. 2d 304; Jur. Stat. 13-15). Once more, and this time in conformity with the Notice of Claim upon which it was founded, Appellant's Petition therein was based expressly upon a claim of misinterpretation of the contractual and statutory provisions in not recognizing the purported resignation of George Campbell, Jr., and nothing more. Says this Petition, in part (Art. 78, R. 14):

"26. The action by the respondents . . . purportedly was pursuant to Section 2602 of the Public Authorities Law in that the aforesaid respondents thought that the aforesaid section had been violated by a member, partner, director, or officer of the petitioner refusing to sign a waiver of immunity.

"27. . . . this action by respondents . . . was an abuse of their discretion and was decided arbitrarily and capriciously, based upon erroneous information and/or interpretation of the aforesaid section of the Public Authorities Law.

"28. Such acts by the respondents were arbitrary, capricious and an abuse of discretion in that the aforesaid George Campbell, Jr. was no longer an officer, director, or stockholder of the petitioner at the time he refused to waive immunity before the Grand Jury, and moreover, was not an officer, director, or stockholder at the time a subpoena was served upon him for his appearance as aforesaid."

9. After service of Notice of Appeal from Justice Tilzer's order Appellant then commenced the third litigation, this time the plenary action now a subject of this appeal. This action was predicated upon the same Notice of Claim alleged in the Article 78 proceeding, and it was referred to in the complaint (Complaint, Par. "20", R. 25) and annexed thereto as an Exhibit (Exh. A Annexed to the Complaint, R. 27).

10. Accompanying this Complaint were an Affidavit and Order to Show Cause for an injunction *pendente lite* (R. 5-10). Once more these were based solely and wholly on the assertion that Appellee Authority had wrongfully disqualified Appellant corporation by reason of a misinterpretation of the contractual and statutory provisions. Says this affidavit, in part (Affidavit of George Morvan, R. 9):

> "17. By letter, hand delivered, on April 23, 1965 (Exhibit 'D' annexed hereto), counsel for plaintiff attempted to disabuse defendants of the numerous factual errors contained in their notice of disqualification, the most significant of which was the fact that the said George Campbell, Jr. was not an officer or director of plaintiff as defendants' notice alleged.
>
> 18. I am informed by counsel that defendants have taken the position that under Section 38 of the General Conditions of the aforesaid contracts between plaintiff and defendants and under Section 2601 of the Public Authorities Law, so long as George Campbell, Jr. was an officer or director when the contract was made, his resignation prior to his refusal to waive immunity is meaningless.
>
> 19. I am informed by counsel that the interpretation placed on the contracts and statute by defendants is clearly erroneous as the annexed Memorandum of Law amply demonstrates."

11. From the foregoing it is entirely clear that nowhere in any of the actual records of these three (actually four, counting the discontinued proceeding against the Attorney General and District Attorney) litigations brought by Appellant for relief from its disqualification, was the remotest question raised, or presented to the courts below, as to the constitutionality of such disqualification, or of the contractual or statutory provisions under which it was effected. On the contrary, all that Appellant sought, and the sole issue it presented to such courts, was an interpretation of such provisions. And in the first Article 78 proceeding it brought before Justice Lyman, Appellant, though subsequently discontinuing it, initially recognized the necessity for and validity of a proceeding to obtain the desired relief under Section 2603 of the Public Authorities Law.

12. Not until the third litigation (the plenary action) was commenced was any mention whatever made by Appellant of "constitutional problems", and then solely by its attorneys' brief and not by anything in the record. And even this was so incidentally, generally and cursorily referred to as not to present any specific constitutional question, state or federal, for adjudication by the courts (Jur. Stat., p. 6).

13. Not even this much of a "constitutional problem" having been raised in the Article 78 proceeding before him, the opinion of Justice Tilzer therein (48 Misc. 2d 544, 265 N.Y.S. 2d 304; Jur. Stat., p. 13) characterized the entire basis thereof as follows:

> (p. 545)
>
> "Such alleged resignation and divestiture of his stock interest in the corporation by George Campbell, Jr. prior to his refusal to waive immunity, appears to be the basis for this proceeding."

14. In the plenary action the opinion of Justice Schweitzer of the New York Supreme Court (Jur. Stat., pp. 16-17)

made no reference to any "constitutional problem". And the opinion of the Appellate Division modifying this determination by dismissing the complaint (26 A. D. 2d 912, 275 N.Y.S. 2d 365; Jur. Stat., p. 17), is based wholly on the record, and again without reference to any "constitutional problem", as follows:

> "The complaint is insufficient because plaintiff is subject to the contractual agreements it made and because on the present allegations plaintiff does not establish a case for equitable relief."

15. Although the New York Court of Appeals, in affirming the orders of the Appellate Division, did hold Section 2601 of the Public Authorities Law constitutional, and the disqualification valid (20 N. Y. 2d 370, 376; Jur. Stat., p. 18), this in itself, as will be shown in the argument below, does not raise a substantial federal question, or otherwise avoid the grounds upon which this motion is based. Principally, it will be noted, the opinion was concerned with the issues and contentions of the parties tendered by the record, and sustained Appellees' position that (a) the purported resignation was ineffectual to prevent the corporation's disqualification and (b) that in any event the exclusive remedy to be pursued by Appellant was that provided by Section 2603 of the Public Authorities Law. (It may be noted, parenthetically, that under the provisions of that statute this procedure may even now be available to Appellant.)

16. Finally, the attention of the Court is respectfully invited to the "Substantial Federal Question" asserted by Appellant, as follows:

> "The federal question raised is whether the assertion of the constitutional privilege against self-incrimination before the grand jury may, without more, result in a penalty, automatic disqualification from bidding on public contracts." (Jur. Stat., p. 8).

In this connection, it is to be noted that the record shows that:

(a) The choice of waiving or not waiving immunity was that of George Campbell, Jr., an individual, and not of this Appellant corporation.

(b) At the time this individual was faced with such choice he had assertedly divested himself not only of his offices, but of every interest in the corporation.

(c) Accordingly, the assertion of such privilege by George Campbell, Jr., was neither "costly" to nor imposed any penalty upon him, directly or through any interest he had in the corporation.

(d) George Campbell, Jr. is and was not at any time a party to these litigations, for the very good reason that at the time of the disqualification he was, and is, by virtue of such asserted divestiture, legally a stranger thereto. These proceedings do not involve his disqualification.

(e) The disqualification of the corporation was imposed pursuant to contractual provisions to which it expressly agreed. That such provisions were required by law makes them nonetheless contractual (See Opinion of Tilzer, J., Jur. Stat., p. 15).

Argument

A Federal Constitutional Question Not Having Been Expressly Passed Upon by the State Court as the Sole Basis for Its Determination, or Shown by the Record to Have Been Timely and Properly Raised, This Court Will Not Assume Jurisdiction of This Appeal.

It appears conclusively from the facts set forth above that nowhere in the Records of the three successive litigations brought by Appellant, two of which are involved in

this appeal, was any constitutional question of any nature—federal or state—raised or presented for adjudication by such courts. From the initial letters of Appellant's attorneys objecting to the disqualification of Appellant by Appellee Authority, through its Notice of Claim, its Petitions, Complaint and affidavits, all made part of the Records herein, Appellant presented solely the question of interpretation of the contractual provisions and statutes in question, and no constitutional issue of any nature.

Appellant's Jurisdictional Statement (Jur. Stat., p. 6) in effect concedes that this to be the case, asserting that solely by means of its attorneys' brief in the third litigation (the plenary action) did it in any way set forth before the court of first instance any matter of a constitutional nature. And even this statement presented nothing in the way of a specific constitutional issue, either state or federal, which called upon the state courts to make such an express constitutional adjudication, particularly of a federal nature, as is required to support the jurisdiction of this Court over this appeal.

As further pointed out above, the lower New York Courts completely ignored and made no mention of any constitutional matter in their decisions. It is true that the New York Court of Appeals (20 N. Y. 2d 376; Jury Stat., p. 18) did so in one sentence, and further cited a simultaneous decision in another case which in turn cited decisions of this Court on constitutiional questions.

As to this it is respectfully submitted, first, that the actual gravamen of the Court of Appeals decision was directed to the only issues presented by the records before it, to wit, the interpretation, not the constitutionality, of the contractual and statutory provisions involved, and the question whether the proper procedure for the relief sought by Appellant was exclusively that provided by Section 2603 of the Public Authorities Law.

Second, the ruling on constitutionality of section 2601 of the Public Authorities Law, even though it cited a case,

decided simultaneously, which in turn cited constitutional cases decided by this Court, does not clearly or expressly predicate such ruling on the federal constitution, or any particular provision thereof. Moreover, in the very sentence containing this ruling there is this statement: ". . . that the disqualification imposed on the appellate corporation is valid". From this it could be concluded that the Court of Appeals predicated its decision, at least in part, on the validity of the disqualification not under the statute, whether or not such statute was constitutional, but as a matter of interpretation under the express provisions of Section 38 of the Contracts. In this connection, the record before that court shows that it was by virtue of such contractual, and not statutory provisions, that the disqualification was both imposed and attacked. And if such contractual provisions could validly have been entered into by the parties—as will hereafter be shown—even if no statute mandating it were in existence, then obviously the reference to constitutionality of the statute, apart from its lack of specificity as to its federal nature, would be unnecessary to the decision. At least, it would not be the sole basis therefor, and therefore would be insufficient to support jurisdiction of this appeal.

In sum, at the most it is only by surmise that there can be spelled out a determination by this state court based solely and necessarily on a question of a federal nature, constitutional or otherwise. Under the foregoing circumstances it has repeatedly been held by this Court that such an appeal is not within its jurisdiction because it does not present a substantial federal question, timely or properly raised, or expressly passed upon (Rule 16).

The case of *Lynch* v. *New York,* 293 U. S. 52, frequently cited by this Court in dismissing appeals on such grounds, *a fortiori* demonstrates this. Therein the record showed that express federal constitutional questions had, unlike the present case, been properly and timely raised. Otherwise, this decision is so apposite to the circumstances of

the present case that leave is respectfully prayed to quote at length from the opinion of this Court therein, rendered by Mr. Chief Justice Hughes, as follows:

> (At pp. 53-55): "The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Division of the Supreme Court, Third Department, annulled the determination of the State Tax Commission. 237 App. Div. 763, 263 N.Y.S. 259. That Court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure

v. Gaillard, 127 U. S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U. S. 300, 306, 307, 34 L. ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 295, 297, 35 L. ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U. S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arguimbau, 198 U. S. 149, 154, 155, 49 L. ed. 990, 993, 25 S. Ct. 622; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 S. Ct. 111, supra; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 S. Ct. 528 supra; Consolidated Turnp. Co. v. Norfolk & O.V.R. Co., 228 U. S. 596, 599, 57 L. ed. 982, 983, 33 S. Ct. 605; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 302, 304, 61 L. ed. 1153, 1157, 1158, 37 S. Ct. 643."

That it is essential to jurisdiction that the federal constitutional issue must be timely and properly raised, and expressly passed upon by the state courts, has also been repeatedly held by this Court. *Bailey* v. *Anderson,* 326 U. S. 203, 206; *Wilson* v. *Cook,* 327 U. S. 474; *Beck* v. *Washington,* 369 U. S. 541, 549-554; *Charleston Federal Savings & Loan Association* v. *Alderson,* 324 U. S. 182, 186 (see, especially, footnote at p. 186).

This Appeal Does Not Present a Substantial Federal Question

A. The determination of the New York courts was predicated basically upon other than constitutional grounds —state or federal.

As has been seen, the disqualification was wholly grounded on the contractual provisions (Par. "4", *supra,* Art. 78, R. 20-21), and the attack on that action was primarily predicated upon Appellant's claim of misinterpretation of such provision (Par. "5", *supra;* Exh. C-1 Annexed to Petition, Art. 78, R. 23-26). Appellee respectfully submits that whether it included the provisions of Section 38 in its contracts by reason of the mandate of Section 2601 of the Public Authorities Law, or had included them even in the absence of such statute, is of no moment. They were purely contractual in either case, and must be so construed. That Appellee Authority had the right to provide for such conditions with or without specific statutory mandate or authority is clear from Section 151 of the New York Public Housing Law, which provides, in part, that the contracts of a Housing Authority may be ". . . in such form and contain . . . such terms and provisions as may be deemed advisable by the Authority". And under the further provisions of such Section 151 "An Authority may make rules and regulations governing the qualification of bidders . . .".

Both Justice Tilzer in the New York Supreme Court (Jur. Stat., p. 15), and the Appellate Division (Jur. Stat., p. 17), clearly based their decisions on such contractual provisions and their interpretation. And primarily, it is submitted, so did the Court of Appeals in affirming these determinations, in holding that ". . . the disqualification imposed on the appellant corporation is valid"; especially in view of the state of the records before it, the opinion of the courts below, and the language of the balance of its opinion interpreting the effect of the purported resignation on these provisions.

B. The contractual provisions and their enforcement present no constitutional or federal question.

Mandatory provisions are required both by state and federal law in private as well as in public contracts—such as standard forms of insurance policies, prevailing rate provisions, and others. Had the contracts here in issue been entered into by Appellant with a private owner, surely it could not contend that the imposition and enforcement of their waiver of immunity provisions, voluntarily assumed and agreed to by Appellant, could raise any constitutional question. That they were entered into with Appellee, a public corporation, makes no difference in their interpretation, validity, effect or enforceability.

Thus, in *Hollerbach* v. *United States,* 233 U. S. 165, this Court said:

[p. 171]:

> "A government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument."

Like private contracts, either the contractor takes them upon the terms and conditions offered, or he leaves them altogether. The choice is his, and it is a completely voluntary one. He cannot take the benefit of those terms which are to his advantage and refuse to assume the onus of those which he deems objectionable. And, it is respectfully submitted, this ought to be especially so where he is required to bid a public contract upon equal terms with his competitors. *Atkins* v. *Kansas,* 191 U. S. 207, 222; *Campbell* v. *City of New York,* 244 N. Y. 317, 327; *People* v. *Crane,* 214 N. Y. 154, 179, aff'd 239 U. S. 195.

Moreover, even were the waiver of immunity required by these contracts that of Appellant corporation itself (if there may be such a thing with respect to a corporation)

rather than that of its individual officer, George Campbell, Jr. (who is not even a party to these litigations), such waiver affected nothing more than its property rights, if any. As clearly appears from the Records, it is such rights only which were the basis of Appellant's attack on the disqualification. There is nothing illegal or unconstitutional in a contract pursuant to which a party waives a constitutional or statutory right, benefit or immunity affecting property rights only—unless, of course, a particular enactment prohibits such waiver.

Cooley, in his *Treatise on Constitutional Limitations* (8th Ed.), Vol. 1, pp. 368-369, puts it this way:

> "Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.", citing:
>
> *Shepard* v. *Barron,* 194 U. S. 553;
> *Humbird* v. *Avery,* 195 U. S. 480;
> *Mayor, etc. of New York* v. *Manhattan Ry. Co.,* 143 N. Y. 1;
> *Musco* v. *United Surety Co.,* 196 N. Y. 459;
> *Pierce* v. *Somerset Railway,* 171 U. S. 641.

Wigmore, in his *Treatise on Evidence* (McNaughton, Rev. ed. 1961), section 2275, v. 8, p. 453, discussing contracts independent of statutory mandate, makes this statement with respect to "Waiver by Contract":

> "It has never been doubted that the privilege against self-incrimination, like all privilege is waivable."

C. The alleged deprivation of constitutional rights was not that of this appellant, and it has no standing to assert them.

To begin with, the privilege against self-incrimination is a purely personal one, and can neither be asserted by the corporation on behalf of its erstwhile individual officer, or

by such individual on behalf of the corporation. *Hale* v. *Henkel*, 201 U. S. 43, 74, 75; *Wilson* v. *United States*, 221 221 U. S. 361, 383-385; *Essgee Co.* v. *United States*, 262 U. S. 151; *United States* v. *White*, 322 U. S. 694, 699; *Baltimore and Ohio R. Co.* v. *Interstate Com. Com.*, 221 U. S. 612, 622.

In the last mentioned case this Court said, for instance:

[p. 622]:

> "With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation . . ."

But more important, it is respectfully submitted that "The Substantial Federal Question" posed by Appellant (Jur. Stat., p. 8), as well as the argument made and cases cited in its support (Jur. Stat., pp. 8-10), in themselves reveal that this Appellant corporation has neither standing nor basis for invoking the constitutional issue sought to be presented in this appeal. That argument is summed up in this statement: ". . . the assertion of the privilege may not, by itself, result in a forfeiture or penalty." (Jur. Stat., p. 8).

Appellee has no quarrel with this general principle. It must be remembered, however, that it was the individual, George Campbell, Jr., who refused to waive immunity, not Appellant corporation. If anyone's constitutional rights were impaired, they were his. But even as to him, and even were he a party to this appeal, what rights of his were impaired?

As noted, the argument is made, and cases cited for the proposition, that the right to refuse such a waiver cannot be made "costly" or the subject of a penalty. But in all of such cases the cost or penalty was threatened against or imposed upon the very one who invoked the privilege. In this instance, on the other hand, it is firmly and ada-

mantly maintained throughout the Records that at the time he was called upon to waive immunity George Campbell, Jr. was legally and actually a total stranger to this Appellant corporation, having given up not only his offices of president and director, but also all of his stock and other financial interests therein. Accordingly, although his refusal to waive immunity resulted in the disqualification of Appellant corporation, it resulted in no penalty or cost to him, individually, of any nature, directly or indirectly. While such disqualification may, indeed, have been costly to and penalized Appellant corporation, that was a risk it assumed by its contracts voluntarily entered into, and not by its assertion of the constitutional privilege posed by this appeal—even assuming that as a corporation it could assert such a privilege.

The Determination Appealed From Not Being Final Within the Meaning of the Judicial Code, 28 U.S.C. Section 1257, This Court Has No Jurisdiction Over This Appeal.

In its opinion the New York Court of Appeals expressly said (20 N. Y. 2d 370; Jur. Stat., p. 19):

(pp. 376-377)

"There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances. (Public Authorities Law, section 2603.) The appellant's exclusive remedy is the procedure outlined in that statute."

That such construction of this state statute was solely the province of the state Court is well settled. *Hicklin* v. *Coney,* 290 U. S. 169, 172. Accordingly, under this decision there has not been laid at rest the continued disqualifica-

tion of Appellant which it seeks to remove by this appeal, since, as the Court of Appeals has stated, it ". . . can be removed . . ." by pursuing this available, though exclusive, procedure. The determination is therefore not "final" within the meaning of the Judicial Code. As stated in *Market Street Railway Co.* v. *Commission of California,* 324 U. S. 548, 551:

> "Final it must be in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

And in *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546, this Court said:

> "It is no longer the rule that the face of the judgment is determinative of whether it is final. Today 'the test is not whether under local rules of practice the judgment is denominated final . . . but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by said court.' Department of Banking v. Pink, 317 U. S. at 268."

In Any Event, the Decision of the State Court Appealed From Is So Manifestly Correct That No Further Argument Thereon Is Necessary.

Appellant relies largely for its attack on the statutory and contractual provisions herein on the recent decisions of this Court in *Garrity* v. *New Jersey,* 385 U. S. 493 and *Spevack* v. *Klein,* 385 U. S. 511 (Jur. Stat., pp. 8-10).

Neither of these cases overruled the line of decisions of this Court holding that although people in public office and on the public payroll may not be compelled to surrender their constitutional privilege against self-incrimination,

they have no constitutional right to remain in office when they refuse to furnish information patently bearing upon their fitness to do so, and to discuss with frankness and candor whether they have faithfully performed their duties. *Nelson* v. *Los Angeles County*, 362 U. S. 1, 7; *Beilan* v. *Board of Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468.

While *Garrity* held that testimony obtained from a police officer under a waiver of immunity induced by a threat of discharge could not be used against him in a criminal prosecution, nothing in the decision indicates that he could not have been discharged from his public office for failure to furnish such information under a waiver. The *Spevack* case, decided at the same time as *Garrity*, held that a lawyer, though licensed by the state—like a doctor, barber or chauffeur—could not be compelled, upon pain of disbarment, to waive his privilege against self-incrimination and testify about his professional conduct. But, as clearly indicated in the concurring opinion of Mr. Justice Fortas, had the case involved an employee of the state, with ". . . the responsibility of an employee to account to the state for his actions . . .", the decision would have been otherwise, and in conformity with the principles of *Nelson, Beilan* and *Lerner, supra.*

It was on this basis that the New York Court of Appeals decided *Gardner* v. *Broderick*, 20 N. Y. 2d 227 (Jur. Stat., pp. 20-23), cited in its opinion in the instant case. Also on this basis was a very recent decision by the United States Court of Appeals, Second Circuit, in *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, —— F. 2d —— (decided Sept. 20, 1967) (not yet officially reported), upholding the discharge of city sanitation employees for refusal to furnish information by pleading their privilege against incrimination, citing *Nelson* v. *County of Los Angeles, supra*, 362 U. S. 1, 7.

That a contractor who voluntarily undertakes by public contract to furnish similar information bearing upon his

conduct in performing other such public contracts, and his consequent qualifications or lack thereof for the award of further public contracts, should be held to equal standards, would seem to be self-evident. It was so held in *United States ex rel. Laino* v. *Warden,* 246 F. Supp. 72 (S.D.N.Y. 1965), aff'd 355 F. 2d 208 (2d Cir., 1965). In an exhaustive and persuasive opinion by the District Court it was said:

[p. 92]:

"We now proceed to the asserted unconstitutionality of Section 103-b of the General Municipal Law of New York.

The statute here under attack was added to the General Municipal Law in 1959. A similar statutory provision was added to the State Finance Law to cover persons doing business with the State (State Finance Law § 139-b, McKinney's Consol. Laws, c. 56) and to the Public Authorities Law to cover persons doing business with a public authority of the state or any political subdivision thereof. (Public Authorities Law § 2602, McKinney's Consol. Laws, c. 43-A.)

The need for this legislation was set forth in the Memorandum of the Attorney General, wherein he stated:

'The Extraordinary Grand Jury conducting an investigation in Ulster County, on January 28, 1959 handed up a presentment pointing out that its inquiry had been blocked by the refusal of persons who had been selling merchandise and equipment to the county to give testimony about their dealings with public officials. It recommended legislation to meet that problem. This bill is such legislation.' (Memorandum of the Attorney General, N. Y. State Legislative Annual 1959, at 148.)

[p. 94]:

"The requirement in Section 103-b, that public contractors waive immunity before investigative bodies on the sanction of possible disqualification, has the same valid basis as those involving public employees.

"Accordingly, it can be argued that the sanction of possible disqualification present in Section 103-b is predicated on the lack of candor and frankness which is expected of one doing business with the state, and that such lack of cooperation and failure to discharge one's responsibility is incompatible with the position held, rather than a disqualification, *eo instantio,* based solely on one's invocation of his Fifth Amendment right. This rationale is, of course, the saving grace whereby prior sanctions of this nature have withstood judicial scrutiny.

[p. 95]:

"Moreover, in one sense relator owed a higher duty to freely discuss and answer questions relating to the performance of his official acts than a Government employee. In the case of a public employee, the state has at least a choice of hiring or not hiring an individual, whereas in the case of a contractor the state's ability to choose is severely restricted.

[p. 96]:

"Similarly in the case at bar, relator possessed no inalienable right to contract with the state. His right in that regard could be tempered by reasonable conditions imposed upon him, one of them being the necessity of being candid with the authorities and giving full answers to questions propounded by investigative bodies, the answers to which would reflect on his qualifications and fitness to utilize the privilege of doing that business. Accordingly, it is not unreasonable for the state to expect that business done with

it was above-board and that persons doing that business would be frank and assist in the investigation of their qualifications. To impede that investigation by any device is to preclude the state from judging those qualifications and breach the trust imposed on a 'quasi' governmental official such as a public contractor.

[p. 98]:

"Accordingly, the constitutionality of Section 103-b will be upheld by this Court."

Said this Court in *Bank of Augusta* v. *Earle* (13 Pet. 443, 512), 10 L. ed. 274, 312, 38 U. S. 517, 596:

"It is but justice to all the parties concerned, to suppose that these contracts were made in good faith, and that no suspicion was entertained by either of them, that these engagements could not be enforced."

CONCLUSION

It is respectfully submitted that this motion to dismiss or affirm should be granted.

October 27, 1967.

Respectfully submitted,

HARRY LEVY,
Attorney for Appellees,
250 Broadway,
New York, New York 10007,
433-5015.

Of Counsel:

PAUL W. HESSEL,
I. STANLEY STEIN.